Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases

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"[F]or the embattled/there is no place/that cannot be/home/nor is."
Audre Lorde[1]

Introduction

Yet another strand of sexual harassment is infecting women's lives and has begun to be treated in our courts: sexual harassment in the home.[2] In increasing numbers, women are being forced to endure demands for sex from those who provide their housing, and

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1. *School Note*, THE BLACK UNICORN 55 (1978).

2. Sexual harassment in the home, or residential sexual harassment, is characterized by:

> a misuse of authority by an individual in a trusted position of power and his exploitation of certain opportunities, both made possible by thestructure of the landlord-tenant metarelationship. It is within that relationship that the landlord abuses his position of power in an effort to ensure sexual compliance.

Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 46 (1998). As defined by the Equal Employment Opportunity Commission (EEOC), sexual harassment consists of "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" when such conduct is made a condition of employment or a factor in decisions affecting employment, or when it unreasonably interferes with work performance or creates an intimidating, hostile, or offensive work environment. 29 C.F.R. § 1604.11(a) (1999). *See generally* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (providing the bedrock legal analysis of sexual harassment as a systematic and socially pervasive form of discrimination based on sex).

to live in environments charged with manifestations of sexism.[3] Public consciousness has recognized the plight of sexual harassment in the workplace,[4] and, more recently, in schools;[5] however, harassment in the home has been considerably overlooked.[6] For many women, the place that is cherished as one of solace and safekeeping has become a painful reminder of how our identity as women has been manipulated into being the target of sex-based discrimination regardless of context. As yet the courts have been slow to recognize the essential distinctions between residential and employment sexual harassment, instead treating them as indistinguishable. This Note asserts that the current doctrinal analysis of residential sexual harassment, imported from employment sexual harassment, fails to address core issues particular to the context of the home.

The courts' routine transposition of standards and paradigms created in the context of the workplace onto fact situations fundamentally unique to the home has resulted in a gross misfit of legal standards. What is most frequently and gravely overlooked by the courts in addressing the sexual harassment of women in their homes is the nature of the harassing conduct itself as inextricable from the context of the home. Acts of harassment in this intimate setting are per se severe. Nonetheless, the current legal framework dictates that such conduct is not actionable unless and until it satisfies a level of severity prescribed in response to harassment in the workplace.[7] Furthermore, the legal doctrine of sexual harassment was designed and has evolved to accommodate the issues that arise from sexual harassment in the

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3. According to the United States Department of Housing and Urban Development (HUD), since the Fair Housing Act was amended in 1988, HUD has processed 3,838 reported incidents of discrimination based on sex, and other HUD-funded state or local civil rights agencies have handled 4,703 additional complaints. *See* HUD, *Housing Discrimination* (visited Jan. 12, 2000) <http://www.hud.gov/women/hsdscrmn.html>.

4. *See, e.g.*, Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (discussing how Title VII is intended to eradicate the entire spectrum of sex-based disparate treatment in employment).

5. *See, e.g.*, Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999) (holding that student-on-student harassment is actionable where plaintiff can prove school officials acted with deliberate indifference and conduct was sufficiently severe, pervasive, and objectively offensive).

6. *See, e.g.*, Adams, *supra* note 2, at 29-30 (stating that "[t]he lack of attention to sexual harassment at home . . . can also be linked to the failure to appreciate the importance of housing and the role the home plays in shaping our material realities. . . . Housing has been the neglected child of the civil rights movement, notwithstanding its absolute centrality to our lives").

7. *See infra* notes 40-41 and accompanying text.

workplace, issues that do not fully or fairly translate to the residence.

In no way is this argument intended to minimize the effects of sexual harassment in the workplace, or to stratify sexual harassment and rank its severity. Indeed, sexual harassment in the workplace and that in the home are inherently inter-related. As sexual harassment is a form of sex discrimination aimed at perpetuating women's subordination, harassing conduct at work impedes women's ability to fully participate in the marketplace, thereby keeping them in a position of financial vulnerability.[8] This economic hardship forces women to seek housing in an increasingly competitive and often coercive rental market, and renders them especially susceptible to exploitation due to their lack of both resources and options.[9] In other words, discrimination in the form of sexual harassment stunts women's ability to earn enough money to afford alternatives to rental housing in a sexually hostile environment, such as buying their own homes or moving out when the harassment occurs.[10] Thus, the nexus between these two contexts is clear when examined from the perspective of the impact of sexual harassment on women's lives. It is equally clear that sexual harassment, as a form of sex discrimination, should be condemned in all of its pervasive forms and contexts.

This Note argues that the current practice of transporting Title VII standards used in analyzing employment sexual harassment into Title VIII cases of residential sexual harassment fails to appreciate the fundamental conceptual and circumstantial distinctions between the two contexts. Section I gives an overview of relevant sex discrimination laws and analyses used by courts in both employment and housing settings.[11] Section II sets forth a number of specific factors substantiating the need for a particularized standard in the housing context. Part A of Section II addresses how the context of the home distinguishes residential sexual harassment from that in the workplace.[12] Part B discusses how the intersection of sex, race, and class renders the class of victims predominantly impacted by residential sexual harassment

8. *See generally* MACKINNON, *supra* note 2 (explaining the dynamics of sexual harassment as a means of economic and social oppression).

9. *See infra* notes 103-113 and accompanying text.

10. *See infra* notes 103-113 and accompanying text.

11. *See infra* notes 17-87 and accompanying text.

12. *See infra* notes 88-102 and accompanying text.

especially vulnerable to discrimination while simultaneously limiting their alternatives to such subjection.[13] Part C examines how the essentially criminal conduct belying residential sexual harassment warrants effective legal condemnation of residential sexual harassment as an offense not only against individual victims, but also against women as a class.[14] Part D discusses the small number of cases to have specifically addressed the need for distinct treatment of sexual harassment in the home as opposed to the workplace, which demonstrates receptivity in some courts of this Note's argument for particular treatment of sexual harassment in housing.[15] Lastly, Part E explains how recent developments in sexual harassment jurisprudence have failed to address issues particular to residential sexual harassment, yet may have a detrimental effect on their resolution through the application of standards that do not fairly translate from Title VII to Title VIII cases.[16] This Note concludes with the assertion that the application of employment standards to sexual harassment in the home fails to distinguish between the two types of discrimination and their distinct consequences, and thus precludes adequate remedies to victims of this intimately invasive and often violent offense against the civil rights of women.

I. Background

A. Title VII

The legal doctrine of sexual harassment originated in the employment context with the passage of the Civil Rights Act of 1964.[17] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of a number of protected classes, including sex.[18] Sexual harassment is a form of sex discrimination.[19] Not unlike the practice of refusing to hire or

13. *See infra* notes 103-113 and accompanying text.

14. *See infra* notes 114-141 and accompanying text.

15. *See infra* notes 142-145 and accompanying text.

16. *See infra* notes 146-190 and accompanying text.

17. 42 U.S.C. § 2000e-2(a)(1) (1999) (stating that it is unlawful for an employer "to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.").

18. *See id.*

19. Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."); 29 C.F.R. § 1604.11

promote women because of their sex, sexual harassment has been described as "an extension of occupational sexual discrimination, in that it furthers the goal of subordinating women."[20] Thus, the harassment of women in the workplace, because of their sex, violates Title VII's anti-discrimination mandate.

Traditionally, sexual harassment has been described as being one of two types, either quid pro quo[21] or hostile environment.[22] Generally, the distinction between these two types lies in whether or not the harassing conduct conditions a material economic benefit on compliance with a sexual demand.[23] However, the Supreme Court has ruled that sexually harassing conduct that creates a hostile or abusive environment is actionable, even where no economic term is affected.[24] The Court based this conclusion on

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(1999) ("Harassment on the basis of sex is a violation of [Title VII]."); MACKINNON, *supra* note 2 (providing the bedrock legal analysis of sexual harassment as a systematic and socially pervasive form of discrimination based on sex).

20. Adams, *supra* note 2, at 22 (explaining further that "[s]exual harassment at work can be understood as an effort to curtail women's invasion of the male public space, the space of commerce, government, and industry—the male domains of power in a capitalist regime.").

21. Quid pro quo sexual harassment, as defined in the EEOC guidelines, consists of:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . . .

29 C.F.R. 1604.11(a) (1997).

22. "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* The EEOC guidelines suggest a number of factors to consider in determining whether there is a hostile environment:

> (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.

EEOC COMPLIANCE MANUAL, SEXUAL HARASSMENT: EEOC POLICY GUIDANCE 3231 (March 19, 1990).

23. *See infra* note 168 (discussing the distinction between the terms); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998) ("Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.").

24. *See Meritor Savings Bank*, 477 U.S. at 65 (holding that both quid pro quo and hostile environment sexual harassment are actionable as discrimination based on sex).

the provision of Title VII that prohibits discrimination in the "terms, conditions or privileges of employment,"[25] recognizing that this clause "is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with . . . discrimination."[26]

B. Title VIII

Residential sexual harassment is directly prohibited by Title VIII, the federal anti-discrimination statute that bans discrimination in housing, parallel to Title VII's protection against discrimination in the workplace.[27] Title VIII of the Civil Rights Act of 1968, or the Fair Housing Act (FHA), was enacted in 1968 "to provide, within constitutional limitations, for fair housing throughout the United States."[28] Congress substantially amended the FHA by passing the Fair Housing Amendments Act of 1988.[29] The amendments revise a number of the procedural requirements and remedies of the FHA to make Title VIII more effectively serve its original purpose.[30] Sections 3604 and 3617 of the FHA serve as

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25. 42 U.S.C. § 2000e-2(a)(1) (1999) (stating that Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensations, terms, conditions, or privileges of employment, because of such individual's . . . sex").

26. *Meritor Savings Bank*, 477 U.S. at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). The Supreme Court cited a number of lower court decisions recognizing that while quid pro quo sexual harassment involves benefits of an economic nature, hostile environment sexual harassment leads to non-economic injuries that are equally protected against. *Id.* at 66. "One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Id.* (citation omitted). "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

27. *See* 42 U.S.C. §§ 3601-19 (1999). The FHA did not include sex among its protected classes until it was amended in 1974. *See* Fair Housing Act, Pub. L. No. 93-383, 88 Stat. 729 (1974) (codified as amended at 42 U.S.C. §§ 3605-3606 (1999)); *see also* 42 U.S.C. § 3604(b) (1999) (stating that Title VIII prohibits discrimination "in the terms, conditions, or privileges of sale or rental . . . or in the provision of services or facilities in connection therewith" based on sex).

28. 42 U.S.C. § 3601 (1999) (stating the Act's declaration of policy).

29. 42 U.S.C. §§ 3601-19 (1999) (incorporating the 1988 Amendments into the original Act).

30. *See* William Litt et al., *Recent Developments: Sexual Harassment Hits Home*, 2 UCLA WOMEN'S L.J. 227, 243-44 (1992). For example, the 1988 Amendments extended the statute of limitations from 180 days to two years after the last incident of harassment, and eliminated the $1,000 cap on awards of punitive damages. *See id.* The 1988 Act also gave both HUD and the United States Attorney General a more active role in pursuing claims on behalf of victims

the foundation for tenants' claims of sexual harassment in housing.[31] Section 3604 prohibits "discrimination in the sale or rental of housing" by making it illegal "to refuse to sell or rent" or "to discriminate against any person in the terms, conditions, or privileges of sale or rental . . . or in the provision of services or facilities in connection therewith" based on race, color, religion, sex, familial status, or national origin.[32] Section 3617 likewise makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by [this Act]."[33] The scope of the FHA is intentionally far-reaching, and it has been held that "the FHA should be given a 'generous construction' to effectuate its 'broad and inclusive' language."[34]

It is striking how few residential sexual harassment claims under the FHA have been decided in the federal courts.[35] While

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of discrimination in housing. *See* United States v. Presidio Invs., Ltd., 4 F.3d 805, 807 (9th Cir. 1993) (explaining the impact of the 1988 Amendments on pending residential sexual harassment claim, and stating, "[n]o longer was the government limited to filing a traditional 'pattern or practice' lawsuit."). For a practical guide to raising a claim of residential sexual harassment using either the administrative remedy or a civil action in federal court, *see* NOW LEGAL DEFENSE AND EDUCATION FUND, INC., SEXUAL HARASSMENT IN HOUSING: A PRIMER (1996).

31. *See* 42 U.S.C. §§ 3604, 3617 (1999) (providing terms under which discrimination is actionable).

32. 42 U.S.C. § 3604 (1999) (prohibiting discrimination in the sale or rental of property, or terms and conditions thereof).

33. 42 U.S.C. § 3617 (1999) (prohibiting retaliation for exercise of fair housing rights).

34. Woods v. Foster, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995) (quoting Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1011 (7th Cir. 1980)); *see also* Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 935 (2nd Cir. 1984) (recognizing that Title VII and Title VIII are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination.").

35. *See* Krueger v. Cuomo, 115 F.3d 487, 492 (7th Cir. 1997) (affirming HUD Secretary's decision that landlord's sexual harassment of tenant violated the FHA); DiCenso v. Cisneros, 96 F.3d 1004, 1009 (7th Cir. 1996) (holding that landlord's proposition to exchange sex for rent, together with his physical touching of tenant, was not sufficiently severe or pervasive to constitute an actionable hostile housing environment); Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993) (holding that the FHA's prohibition against sex discrimination includes sexual harassment); United States v. Presidio Investments, Ltd., 4 F.3d 805, 809-10 (9th Cir. 1993) (holding that the 1988 Amendments to the FHA applied retroactively to pending case, and consequently reversing lower court's grant of summary judgment to defendant); Shellhammer v. Lewallen, 770 F.2d 167 (6th Cir. 1985) (upholding magistrate's finding that by analogy to Title VII both hostile environment and quid pro quo sexual harassment are viable legal claims under the FHA; however, plaintiffs succeeded in proving only quid pro quo claim, not hostile environment); Cavalieri-Conway v. L. Butterman and Assocs., 992 F. Supp. 995, 1008 (N.D. Ill. 1998) (stating that the elements of a Title VIII housing discrimination claim are parallel

the courts have transposed the same doctrinal analysis developed in the employment context to the few residential cases they have ruled on, the number of sexual harassment in housing cases in no way parallels the rate of sexual harassment in employment claims being brought in federal courts.[36] The remarkably small number of cases does not reflect the rate of incidence of sexual harassment against tenants, but rather how rarely such incidents are reported.[37] A host of factors contribute to this dearth, including

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to a Title VII employment discrimination claim, but holding that plaintiff proved neither her quid pro quo nor her hostile environment claim of residential sexual harassment); Reeves v. Carrollsburg Condominium Unit Owners Ass'n, No. 96-2495 (RMU), 1997 U.S. Dist. LEXIS 21762, at *1 (D.D.C. Dec. 18, 1997) (recognizing a cause of action for sexual harassment under the FHA, and denying summary judgment on liability of condominium association); Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 496 (D. Md. 1996) (holding, as a case of first impression, that sexual harassment is actionable under the FHA); Woods v. Foster, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995) (mem.) (holding that homeless shelter is dwelling within the purview of the FHA, and thus sexual harassment by shelter authorities was a violation thereof); Beliveau v. Caras, 873 F. Supp. 1393, 1397(C.D. Cal. 1995) (holding that sexual harassment in unquestionably a form of discrimination and thus harassment of tenant by resident manager violates the FHA); Doe v. Maywood Hous. Auth., No. 93-C2865, 1993 WL 243384, at *1 (N.D. Ill. July 1, 1993) (mem.) (recognizing a cause of action for sexual harassment in violation of the FHA); Bethisou v. Ridgeland Apartments, No. 88-C5256, 1989 U.S. Dist. LEXIS 11986, at *1 (N.D. Ill. Sep. 28, 1989) (mem.) (denying motion for indemnification of defendant's business partner against judgment stemming from acts of sexual harassment by defendant apartment manager, where both defendants had been held liable by trial court); New York *ex rel.* Abrams v. Merlino, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988) (holding, as a case of first impression, that sexual harassment constitutes sex discrimination as prohibited by the FHA, even where no loss of housing is claimed); Grieger v. Sheets, 689 F. Supp. 835, 840 (N.D. Ill. 1988) (holding that sexual harassment is actionable under the FHA); *see also* Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 240 (E.D.N.Y. 1998) (upholding claims of discrimination based on race and national origin, but dismissing sex discrimination claim without discussion because the plaintiffs did not offer specific factual allegations to support their claim); Burgess v. United States, No. C96-0205, 1997 U.S. Dist. LEXIS 6015 (N.D. Cal. April 28, 1997) (dismissing plaintiff's claim of sexual harassment for lack of proof that the conduct complained of was of a sexual nature, or, if it was, that it was sufficiently severe or pervasive; this is the sole case in which the plaintiff is a male alleging sexual harassment by a female). All the cases cited herein recognize that sexual harassment is an actionable form of discrimination prohibited by the FHA, and include some discussion of the applicability of Title VII sexual harassment doctrine to cases dealing with sexual harassment in housing under Title VIII. *See also* David J. Stephenson, Jr., J.D., Annotation, *Actions Under Fair Housing Act Based on Sexual Harassment or Creation of Hostile Environment*, 144 A.L.R. FED. 595 (1999).

36. *See, e.g., DiCenso*, 96 F.3d at 1008 (noting that "[c]laims of hostile environment sex discrimination in the housing context have been far less frequent [than in the employment context].").

37. *See* Regina Cahan, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WISC. L. REV. 1061 (1987). In this ground-breaking article,

fear of retaliatory eviction and reluctance to report unless the victims feel safe and protected from further harassment.[38] These factors are exacerbated by the distinct intersection of sex, race, and class, each of which has been targeted by its own breed of discrimination, and therefore together compound to render low-income minority women particularly susceptible to discriminatory practices.[39] In sum, the handful of cases brought under the FHA in federal courts is an exceptional under-representation of the magnitude of sexual harassment in housing.

In the context of housing, "'[q]uid pro quo' harassment occurs when housing benefits are explicitly or implicitly conditioned on sexual favors."[40] Likewise, a hostile housing environment is actionable "when the offensive behavior unreasonably interferes with use and enjoyment of the premises," so long as the harassment is "'sufficiently severe or pervasive' to alter the conditions of the housing arrangement."[41] Thus, the elementary foundation of the doctrine of sexual harassment has been transposed from the workplace to the home, with minimal changes

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Cahan stated that 65 percent of the fair housing agencies that responded to her nationwide survey reported receiving complaints of sexual harassment by owners and landlords, for a total of 288 claims of sexual harassment in housing. *See id.* at 1066. Cahan stated that, "Taking into account the various reasons women are reluctant to report their harassment, it is likely the actual incidents of sexual harassment in housing number more than the 288 reported." *Id.* Cahan cited the results of a survey of sexual harassment in the workplace that reported that only two to three percent of victims use formal institutional remedies to report their harassment. *See id.* She then analogized these results to the housing environment, deducing that if the nearly 300 reported incidents are in fact only a comparable fraction of overall instances, between 6,818 and 15,000 cases of residential sexual harassment may have actually occurred. *See id.* at 1069-70. A later article on sexual harassment in housing suggests that even these figures are grossly under-representative of the frequency of such harassment. *See* Litt et al., *supra* note 30, at 231-44.

38. *See* Cahan, *supra* note 37.

39. *See infra* notes 103-113 and accompanying text.

40. *Honce*, 1 F.3d at 1089 (quoting Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987)).

41. *Id.* at 1090 (citing *Hicks*, 833 F.2d. at 1413). The elements of a prima facie case of hostile environment sexual harassment in housing are that:

> (1) the conduct was unwelcome; (2) it was based on the sex or other protected characteristic of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's living conditions and to create an abusive environment; and (4) the defendant knew or should have known of the harassment, and took no effectual action to correct the situation.

Reeves v. Carrollsburg Condominium Unit Owners Ass'n, No. 96-2495 (RMU), 1997 U.S. Dist. LEXIS 21762, at *23 (D.D.C. Dec. 18, 1997) (quoting Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 496 n.2 (D. Md. 1996)).

in terminology to reflect the different contexts.[42]

C. Courts' Analyses of Discrimination Claims

Under either Title VII or Title VIII a plaintiff may establish a case of intentional discrimination[43] using one of two distinct evidentiary routes, either by providing direct evidence of discrimination, or by establishing indirect evidence from which discriminatory intent is inferred and may be rebutted.[44] The indirect method of proving discriminatory intent employs a burden-shifting analysis known as the *McDonnell Douglas* test.[45] This burden-shifting framework requires a plaintiff to satisfy a number of elements to establish a prima facie case of discrimination.[46] Once a plaintiff proves her prima facie case, the burden then shifts to the defendant to offer legitimate, non-discriminatory reasons for its decision.[47] After the defendant presents rebuttal evidence, the plaintiff has the opportunity to show that the defendant's articulated reason is a pretext for discrimination.[48] The elements of the prima facie case are modified to accommodate the general facts of each case, allowing the *McDonnell Douglas* burden-shifting technique the flexibility to apply to any claim of discrimination for which the plaintiff lacks

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42. *See supra* notes 21-26 (discussing categories of quid pro quo and hostile environment under Title VII cases).

43. Intentional discrimination is commonly referred to as "disparate treatment." *See, e.g.*, Kormoczy, v. Secretary of United States Dep't of Hous. & Urban Dev., 53 F.3d 821, 824 (7th Cir. 1995) (explaining in general the distinction between the direct and indirect methods of proving intentional discrimination); *Honce*, 1 F.3d at 1088-89 ("The ultimate question in a disparate treatment case is whether the defendant intentionally discriminated against plaintiff."). Conduct may also be actionable if it is proven that certain acts or policies have the effect of disproportionately burdening members of a protected class; this latter category is termed "disparate impact." *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-99 & n.3 (1988) (plurality opinion) (discussing disparate impact analysis under Title VII); Williams v. The 5300 Columbia Pike Corp., 891 F. Supp. 1169, 1178 (D.E. Va. 1995) (analyzing the allegation that a condominium conversion had a disparate impact on racial minority and disabled tenants).

44. *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (stating that where a plaintiff produces direct evidence of discrimination, the indirect *McDonnell Douglas* burden-shifting approach is inapplicable).

45. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-06 (1973) (explaining the inferential burden-shifting test for discrimination).

46. *See id.* at 802; *see also Honce*, 1 F.3d at 1089 ("In the context of employment discrimination, a prima facie case requires proof that the employer, after rejecting plaintiff's application, continued to seek applicants with qualifications similar to plaintiff's.")

47. *See McDonnell Douglas*, 411 U.S. at 802.

48. *See id.* at 804-05.

direct evidence.[49]

Courts routinely apply doctrinal standards developed in Title VII employment discrimination cases to housing discrimination cases governed by Title VIII.[50] Thus, the general legal framework used to establish a claim of employment discrimination has been imported in substantially identical form to the arena of housing discrimination.

D. Courts' Analyses of Sexual Harassment Claims

The courts have treated sexual harassment as a distinct and discrete subset of discrimination with its own specific doctrinal analysis, rather than applying the general framework used to assess other claims of discrimination.[51] According to standards used to evaluate intentional discrimination, sexually harassing conduct constitutes direct evidence of discriminatory intent according to the theory of disparate treatment.[52] However, courts instead employ a unique categorical examination aimed at

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49. The *McDonnell Douglas* prima facie case is altered by courts to accommodate the pertinent protected class—e.g., sex, race, disability, etc.—and/or the type of discrimination, either a denial of the vacant position or apartment, or a change in the terms and conditions thereof. *See id.* at 802 n.13 (noting that the facts will vary in Title VII cases and the specification of *prima facie* proof required is not necessarily applicable in every respect to differing factual situations); *see also* Reeves v. Carrollsburg Condominium Unit Owners Ass'n, No. 96-2495 (RMU), 1997 U.S. Dist. LEXIS 21762, at *23 n.10 (D.D.C. Dec. 18, 1997) ("[T]he elements of a prima facie case should be adapted to fit the circumstances."). In a case of housing discrimination based on sex, this theory would therefore require a plaintiff to show either that the landlord refused to rent to her but did rent to a similarly or less-qualified male, or that the plaintiff's tenancy is subject to terms and conditions not imposed on male tenants. *See, e.g.*, Braunstein v. Dwelling Managers, Inc., 476 F. Supp. 1323, 1324 (S.D.N.Y. 1979) (finding no sex discrimination in policy of federally subsidized housing complex that restricted single parent with child of same sex to one-bedroom apartment but gave single parent with child of opposite sex a two-bedroom apartment, holding that it was the composition of the family unit, and not sex, that determined allocation).

50. *See, e.g.*, Kormoczy v. Secretary of United States Dep't of Hous. & Urban Dev., 53 F.3d 821, 832-24 (7th Cir. 1995) (applying employment discrimination standards to familial status discrimination in housing prohibited by the FHA); Gamble v. City of Escondido, 104 F.3d 300, 304 (9th Cir. 1997) (applying employment discrimination framework to disability discrimination in housing governed by the FHA, stating explicitly, "We apply Title VII discrimination analysis in examining Fair Housing Act ('FHA') discrimination claims.").

51. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-69 (1986) (setting forth analysis for sexual harassment).

52. *See, e.g.*, *Kormoczy*, 53 F.3d at 824 (explaining in general the distinction between the direct and indirect methods of proving intentional discrimination); Honce v. Vigil, 1 F.3d 1085, 1088-89 (10th Cir. 1993) (applying theory of disparate treatment to residential sexual harassment claim).

determining the nature and impact of the conduct.[53] The particularized doctrine of sexual harassment has evolved in the context of Title VII employment cases, then been imported into the housing environment.[54] Residential sexual harassment cases have consistently been addressed using the legal framework established in the employment context.[55]

While claims of discrimination are analyzed using the well-founded *McDonnell Douglas* burden-shifting technique, and claims of sexual harassment are assessed according to equally established framework that has been honed and circumscribed through case law, there is an apparent incomprehension among the courts regarding the interplay between the two doctrines.[56] Because sexual harassment is a form of discrimination based on sex, at first glance it would seem fitting that analysis of the harassment would be a subset of a claim of discrimination.[57] The courts that have reviewed residential sexual harassment cases, however, have decided otherwise. Some have found that the harassing conduct constitutes direct evidence of discrimination and therefore the burden-shifting technique for inferentially proving intentional discrimination is inapplicable.[58] Other courts have subjected

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53. *See, e.g.*, Harris v. Forklift Sys, Inc., 510 U.S. 17, 21 (1993) (clarifying the applicable standard for assessing hostile environment sexual harassment as including both objective and subjective considerations).

54. *See Meritor Savings Bank*, 477 U.S. at 63-69 (discussing evolution of sexual harassment jurisprudence).

55. *See, e.g.*, Williams v. Poretsky Management, Inc., 955 F. Supp. 490, 495 (D. Md. 1996) (citations omitted), which states:

> The courts generally rely upon three grounds in finding that sexual harassment claims are actionable under the Fair Housing Act. First, sexual harassment is actionable under Title VII in the employment context. Because Title VII and Title VIII share the same purpose—to end bias and prejudice—sexual harassment should be actionable under Title VIII .... Second, other courts have so held .... Third, the Supreme Court has held that sexual harassment is a form of sex discrimination.

Id.

56. *See* Miranda Oshige, *What's Sex Got To Do with It?*, 47 STAN. L. REV. 565, 570-72 (1995) (explaining how current sexual harassment doctrine unjustifiably distinguishes between discrimination based on sexual conduct and discrimination based on non-sexual conduct).

57. *See id.*

58. *See* Reeves v. Carrollsburg Condominium Unit Owners Ass'n, No. 96-2495 (RMU) 1997 U.S. Dist. LEXIS 21762, at *16-17 (D.D.C. Dec. 18, 1997). In response to the defendant's contention that the plaintiffs failed to state a claim of sex discrimination under the FHA, the court explained:

> The burden-shifting framework in *McDonnell Douglas* and its progeny is commonly used to establish discriminatory intent when direct evidence is unavailable in disparate treatment discrimination cases. However, the

claims of sexual harassment to the preliminary requisite of the *McDonnell Douglas* test, requiring plaintiffs to establish a prima facie case of discrimination.[59] Still others have subverted the cognition of harassment within the greater context of discrimination by effectively removing sexual harassment cases from the discrimination paradigm and treating them separately and in isolation.[60] In addition to the erratic assessment of sexual harassment as a form of discrimination based on sex, the courts rarely articulate their approach, thereby compounding the discrepancy as to the relationship between sexual harassment and discrimination.[61] In sum, there is substantial confusion as to which doctrinal approach a court will take when analyzing a case of sexual harassment, and the reasons therefor.

E. Recent Changes in the Doctrine of Sexual Harassment

In 1998 the Supreme Court issued decisions in two employment sexual harassment cases, *Burlington Industries, Inc.*

> defendant Association's reliance on this line of cases is misplaced because the present case involves direct evidence of discrimination, namely . . . direct and unequivocal racist and sexist statements and writings. Therefore, the plaintiffs contend that the appropriate standard should be a hostile environment test. . . . The court agrees.

Id.

59. *See* Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993). The structure of the court's opinion illustrates its conceptualization of the issues: under the general heading "The Fair Housing Act," the court subdivided its analysis into sections entitled "Disparate Treatment," "Sexual Harassment," and "Hostile Housing Environment," treating each as conceptually distinct. *Id.* at 1088-90. The court ultimately held that because the defendant landlord's conduct "was neither sexual nor directed solely at women, it is not actionable under the hostile housing environment theory." *Id.* at 1090. One of the three judges of the panel vigorously dissented, authoring an opinion longer than that of the majority. *See id.* at 1091-98 (Seymour J., dissenting) ("The majority proceeds under an inaccurate view of the applicable law. Although it articulates the proper test, it appears to evaluate the sexual harassment evidence under a crabbed definition that has been specifically rejected by this court."). *Id.* at 1091.

60. *See* DiCenso v. Cisneros, 96 F.3d 1004, 1007-08 (7th Cir. 1996) (explicitly refusing to grant any deference to the EEOC Guidelines that define sexual harassment as a form of sex discrimination, then analyzing the case *de novo* as one based on a hostile housing environment theory).

61. In deciphering what mode of analysis a court is employing, it is important to bear in mind that the fundamental purpose of the *McDonnell Douglas* burden-shifting technique is to assist plaintiffs in proving discriminatory intent by raising a presumption of discrimination. *See* E-mail Interview with Kevin Ruether, Staff Attorney, Housing Discrimination Law Project, Minneapolis, Minn. (Jan. 3-4, 2000). While defendants retain the opportunity to rebut this presumption, nonetheless the burden-shifting approach is a critical tool used to prove discrimination in situations in which direct proof is rare or difficult to obtain. *Id.*

v. Ellerth[62] and *Faragher v. City of Boca Raton*,[63] holding that agency principles,[64] not the categories quid pro quo and hostile environment, should determine employer liability for sexual harassment. The Court stated: "The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this

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62. 524 U.S. 742 (1998).

63. 524 U.S. 775 (1998). The Court decided a third sexual harassment case that term, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which held that same-sex sexual harassment in the workplace is an actionable form of sex discrimination under Title VII. However, the residential sexual harassment cases that have reached the federal courts have not raised this issue, and thus it is not pertinent here. *But see* Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 239 n.2 (E.D.N.Y. 1998) (stating that women plaintiffs' claim of sexual discrimination by women defendants was not supported by specific factual allegations; however, defendants' motion to dismiss plaintiffs' claims of discrimination based on race, religion, and national origin was denied).

64. *See Ellerth*, 524 U.S. at 754-65 (reemphasizing the fact that courts are to be guided by principles of agency law when deciding issues of employer liability for acts of harassment committed by their employees). *See id.* at 757. The central principle of agency law is: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Id.* at 756 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957)). This liability may extend to both negligent and intentional torts; however, because of the limiting clause "in the scope of their employment," it is less likely that an employer will be held liable for an employee's intentional tortious conduct. *See id.* at 756-57. Only conduct motivated "at least in part, by a purpose to serve the [employer]" may confer liability to the employer. *Id.* at 756. Therefore, because "[s]exual harassment under Title VII presupposes intentional conduct," an employer may be liable for only harassment intended to further the employer's business. *Id.* at 756. Most succinctly, the *Ellerth* Court stated, "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." *Id.* at 757. However, agency principles may impose liability on the employer for the acts of its employees even where those acts are outside the scope of their employment. *See id.* (citing RESTATEMENT (SECOND) OF AGENCY § 219(1)(1957)). Vicarious liability may be imposed on the employer for intentional torts committed by an employee when employee uses apparent authority or when the employee is aided by the agency relationship. *See id.* at 759. The "aided in the agency" relation standard seems *prima facie* to encompass most harassment by a supervisor, as "[p]roximity and regular contact may afford a captive pool of potential victims." *Id.* at 760. Yet if there were any intention to construe this provision according to its plain meaning, the Court has spoken against it. *See id.* The Court instead imposed a much higher burden in order to prevent the allegedly undesirable result of holding an employer liable "not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue." *Id.* The Court stated that, "The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself." *Id.* What this "something more" is depends on the harassment itself. *See id.* The Court here distinguished between harassment that culminates in a tangible employment action, and conduct that may be committed by any co-worker and hence does not involve the supervisory role of the harasser. *See id.* at 760-62.

are of limited utility."[65] The former quid pro quo/hostile environment distinction is now replaced by a new "tangible employment action" standard articulated by the Court.[66]

These recent developments dictate that the central inquiry in determining liability is whether the harassment resulted in "direct economic harm."[67] "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[68] However, despite the Court's declaration that the former quid pro quo and hostile environment categories are of limited utility, the phrase "hostile environment" is not rendered obsolete by these decisions.[69] First, the *Ellerth* Court's pronouncement may be limited to the assignment of liability based on which type of harassment occurred, in which case hostile environment claims remain unaffected by this new decision.[70] Furthermore, the Court itself used the phrase "actionable hostile

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65. *Id.* at 751.

66. *Id.* at 761 (describing what may be a tangible employment action).

67. *Id.* at 762.

68. *Id.* at 761.

69. The Supreme Court's concern with the terminology used to describe sexual harassment was motivated solely by the impact of these categories on the issue of employer liability. *See Ellerth*, 524 U.S. at 752-54. The Court stated, "The question presented on certiorari is whether Ellerth can state a claim of *quid pro quo* harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for [a supervisor's] alleged misconduct, rather than liability limited to its own negligence." *Id.* at 753. Formerly, if a claim was raised as one of quid pro quo sexual harassment, the employer was subject to automatic liability. *See id.* at 753. The Court stated, "The standard of employer responsibility turned on which type of harassment occurred. If the plaintiff established a *quid pro quo* claim, the Court of Appeals held, the employer was subject to vicarious liability." *Id.* at 752-53. Only where a plaintiff raised her claim as a hostile environment one was she required to undergo the more rigorous test of whether the harassment was severe or pervasive. *See id.* at 753-54. According to the Court's opinion in *Ellerth*, the assignment of vicarious liability to quid pro quo sexual harassment was problematic because this practice "encouraged Title VII plaintiffs to state their claims as *quid pro quo* claims, which in turn put expansive pressure on the definition." *Id.* at 753; *see also id.* at 765 ("Relying on existing case law which held out the promise of vicarious liability for all *quid pro quo* claims, Ellerth focused all her attention in the Court of Appeals on proving her claim fit within that category.") In essence, the Court mistrusted the distinction signified by the categories quid pro quo and hostile environment to effectively determine when an employer is liable for the harassment, and therefore supplanted them by imposition of the new tangible action standard. *See id.* at 751-66 (articulating the Court's perceived problems with the use of the quid pro quo/hostile environment distinction as it affects employer liability and explaining the standard of liability under tangible employment action analysis).

70. *See supra* note 59.

environment" in its holding in *Faragher*.[71] Thus the term remains significant for its descriptive function, yet has no bearing on consequent liability. In sum, the standard announced in *Ellerth* and *Faragher* replaces the former category of quid pro quo with a new analysis regarding whether any tangible action has been taken as a result of the harassing conduct, and leaves the hostile environment classification substantially intact.

In addition to declaring that the category of quid pro quo sexual harassment is superceded by the new tangible action standard, the Court articulated a distinct test for determining whether and when an employer is liable for the sexually harassing conduct of its supervisory employees.[72] The Court held that an employer is vicariously liable for "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[73] If no tangible employment action is found, an employer may raise an affirmative defense to liability or damages.[74] To succeed on this new affirmative defense, an employer must prove both that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[75] This affirmative defense is not available "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."[76] If a tangible employment action is proven, the employer is automatically liable.[77]

Prior to *Ellerth* and *Faragher*, the lower courts struggled to interpret the standards set forth in *Meritor Savings Bank, FSB v. Vinson*,[78] the Supreme Court's sole decision offering guidance in determining employer liability for sexual harassment in the

71. Faragher v. Boca Raton, 524 U.S. 775, 807 (1998).

72. *See Ellerth*, 524 U.S. at 761-65; *Faragher*, 524 U.S. at 802-805.

73. *Ellerth*, 524 U.S. at 765.

74. *See id.*

75. *Id.*

76. *Id.*

77. *See generally* Jonathan Hegre & Sheila Engelmeier, *Dazed and Confused: Title VII One Year After* Faragher *and* Ellerth, BENCH & BAR, Oct. 1999, at 37 (discussing the imposition of automatic employer liability).

78. 477 U.S. 57, 64-65 (1986) (holding that both quid pro quo and hostile environment sexual harassment are actionable as discrimination based on sex).

workplace.[79] In light of the many and disparate methods applied, the new test established by *Ellerth* and *Faragher* appears to offer a clear solution to the apparent enigma of employer responsibility for sexual harassment.[80] Indeed, resolving the issue of employer liability was the impetus behind both of these decisions, which provide lengthy justifications for what was essentially an affirmation of *Meritor*'s dictate: courts should apply principles of agency law when deciding vicarious liability for sexual harassment.[81] Pursuant to the Supreme Court's clarification of how to apply established agency law in light of the new tangible action standard, the EEOC has amended its Guidelines to accommodate the Court's rulings.[82] Lower courts now have both the decree of our highest court and the relevant federal agency as guidance in their determinations of vicarious liability for sexual harassment in the workplace.

Translating these recent developments to the realm of housing, if a sexually harassed tenant wishes to pursue a claim holding a landlord accountable for a sexual demand prior to being evicted or suffering some other economic injury, she must raise her claim as a hostile housing environment one.[83] An actionable hostile housing environment exists when there is no tangible housing action taken as a result of the harassment, yet the harassment is proven sufficiently severe or pervasive.[84] The most

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79. *See* Faragher v. Boca Raton, 524 U.S. at 775, 793-805 (analyzing the different approaches employed by the lower courts to impose vicarious liability).

80. *But see* Hegre & Engelmeier, *supra* note 77 (arguing that lower courts continue to struggle in deciding employer liablility, now specifically in interpreting the Supreme Court's holdings in *Ellerth* and *Faragher*).

81. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 69-73 (1986) (discussing the imposition of vicarious liability and stating that general principles of agency law should govern); *Faragher*, 524 U.S. at 792 ("*Meritor*'s statement of the law is the foundation on which we build today.").

82. *See* 29 C.F.R. § 1604.11 (1999). The EEOC has also issued a press release explaining its issuance of the final rule to conform to the Court's decisions. *See* EEOC, *EEOC Updates Guidelines to Comply with Supreme Court Rulings on Employer Liability for Harassment by Supervisors* (last modified Oct. 29, 1999) <http://www.eeoc.gov/press/10-29-99.html>.

83. *See Ellerth*, 524 U.S. at 754 (stating: "For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.").

84. *See id.*; *see also Meritor Savings Bank*, 477 U.S. at 67 (citing Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the condition of [the victim's] employment and create an abusive working environment.'"); Honce v. Vigil, 1 F.3d 1085, 1090 (10th Cir. 1993) (stating that a hostile housing environment claim is actionable "when the offensive behavior unreasonably interferes with use and enjoyment of the premises").

substantial change *Ellerth* and *Faragher* impose on residential sexual harassment is the reconceptualization of sexual demands coupled with unfulfilled threats as not quid pro quo claims, but rather conduct that may create a hostile housing environment—if the plaintiff is able to satisfy the requirement that such conduct is sufficiently severe or pervasive.[85] What constitutes severe or pervasive harassment varies by court, as each interprets the relevant factors differently.[86] On the other hand, if the tenant is evicted or some other tangible housing action is inflicted after she refuses the landlord's sexual advance, the landlord will be held automatically liable. It is as yet unknown how federal courts will apply the tangible housing action standard derived from the Supreme Court's opinions in *Ellerth* and *Faragher* to residential sexual harassment, and whether these doctrinal changes will have any substantial effect on the outcomes of Title VIII sexual harassment cases.[87]

II. Analysis

A. The Context of the Home Renders Residential Sexual Harassment Distinct from that in the Workplace.

The expectation of both safety and privacy in one's home is justifiably greater than that in the workplace, and thus a higher standard of conduct is warranted. Enforcing a heightened standard would raise the threshold for what conduct constitutes harassment, thereby legally condemning harassing behavior that may not be actionable when it occurs in the workplace.[88] It would also signify legal and social intolerance for sexual innuendos, propositions, and demands in perhaps the only place in which authority and autonomy are unquestionable entitlements. In other words, strict enforcement of anti-discrimination laws regarding sexual harassment in the home would provide at least one environment in which women would be free from the degradation of sexual objectification.

The home has always been held to deserve special protection from intrusion, and thus a higher standard for residential sexual

85. *See* 477 U.S. at 67; 1 F.3d at 1090.

86. *See infra* notes 156-172 and accompanying text.

87. To date, no residential sexual harassment decision interpreting and applying the standard announced in *Ellerth* and *Faragher* has been issued.

88. *See, e.g.*, Beliveau v. Caras, 873 F. Supp. 1393, 1395-98 (C.D. Cal. 1995) (factoring the context of the home into its analysis).

harassment is in principle substantiated by virtually all of American jurisprudence.[89]

> Under criminal law, one can shoot an intruder to defend it. Under tort law, one has a reasonable expectation of privacy within it. Under constitutional law, one has a right to be free from unreasonable searches and seizures within it, and a right to engage in certain activities and make certain decisions within the home.[90]

Protection of the home is so embedded in the history and traditions of our jurisprudence that the sanctity of the home has become an established doctrine in its own right.[91] While most frequently cited in cases involving intrusion by governmental entities,[92] the sanctity of the home doctrine has been invoked in a variety of other settings,[93] and firmly stands for the proposition

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89. *See* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who Is the Reasonable Person?*, 38 B.C. L. REV. 861, 886-88 (1997) (internal quotations and citation omitted):

> The home is a moral nexus between liberty, privacy, and freedom of association. Accordingly, it is not uncommon for the law to provide greater protections to the situations involving the home. Several constitutional provisions provide special protection for the home, and the sanctity of the home has consistently been protected by the United States Supreme Court .... As noted by one court, the principal object to be effectuated by granting special protection to the home is to preserve the home to the family, even at the sacrifice of just demands, for the reason that the preservation of the home is deemed of paramount importance.

Id. But see Adams, *supra* note 2, at 22 n.17 (stating that the privileged status of the home is "a rebuttable presumption highly dependent on the social and economic status of the home occupier").

90. Adams, *supra* note 2, at 22-23 (citations omitted) (arguing the importance and the privileged character of the home).

91. *See, e.g.*, Sheik-Abdi v. McClellan, 37 F.3d 1240, 1243 (7th Cir. 1994) (quoting Oliver v. United States, 466 U.S. 170, 178-79 (1984)) ("The Supreme Court consistently has emphasized 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origin of the Republic,' because the home, more than any other location, 'provides the setting for those most intimate activities'"); *see also* United States v. One Ford V-8 Sedan, 7 F. Supp. 705, 707 (D.C. Mich. 1934) (discussing the origins of the doctrine of the sanctity of the home, and stating: "Courts should not fail to take cognizance of the fact that the enemies of civilization are now attempting to occupy the castle erected by judicial decision to protect the innocent."). *Id.*

92. *See, e.g.*, Payton v. New York, 445 U.S. 573, 603 (1980) (holding that warrantless arrests in one's home violate the Fourth Amendment, even though the same warrantless arrest in public may be permissible, because the sanctity of the home confers special protection).

93. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding ordinance that prohibited picketing outside one's home in light of First Amendment challenge). The Court found that the ordinance served the significant government interest of preserving and protecting the sanctity of the home, the place in which persons can "repair to escape from the tribulations of their daily pursuits." *Id.* at

that the home, as both a conceptual entity and a physical place, warrants the utmost judicial protection.[94] As the Supreme Court has noted, "[s]anctity of the home is no greater than sanctity of the person."[95]

The home is not only a moral nexus,[96] uniting shared beliefs about family and privacy, but also a social and economic one.[97] Geographic and socioeconomic placement of one's home predetermines access to a greater opportunity structure, including fundamental resources such as employment and education.[98] Furthermore, the incessant phenomena of segregation and other forms of racial and class-based discrimination perpetuate and preserve the concentration of poverty in urban ghettos, stagnating the potential for improvement in inner-city communities.[99] The politicization of place demonstrates the crucial role one's home plays in defining relative socioeconomic status as inextricable from residential location, as well as in providing or limiting access to myriad means of social and personal development.[100] In other words, the home is invested with the power to define not only who a person is, but also who a person is to become.

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484. The Court stated that ensuring that people could "enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy" is a goal of the "highest order." *Id.* at 477.); *see also* Engblom v. Carey, 677 F.2d 957, 962 (2nd Cir. 1982) (denying summary judgment against plaintiff correctional officers forced to quarter National Guard officers in their staff housing while the correctional officers were on strike, invoking the sanctity of the home doctrine as derived from the Third Amendment. "The Third Amendment was designed to assure a fundamental right to privacy. [Although] the privacy interest arises out of the use and enjoyment of a property . . . rigid notions of ownership are not prerequisites to constitutional protections." (internal citations omitted)).

94. *See, e.g.*, United States v. Shafii Shaibu, 920 F.2d 1423, 1426 (9th Cir. 1990) ("Judicial concern to protect the sanctity of the home is so elevated that free and voluntary consent cannot be found by a showing of mere acquiescence to a claim of lawful authority.").

95. Agnello v. United States, 269 U.S. 20, 25 (1925) (holding that warrantless search of an arrestee's home, several blocks away from the site of his arrest, violated the Fourth Amendment).

96. *See* Zalesne, *supra* note 89 (arguing that the home has always been held to deserve special protection from intrusion).

97. *See* Adams, *supra* note 2, at 26-28 & n.43 (discussing how "the home functions as a connection to particular and highly desired communities").

98. *See* john a. powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749 (1996) (explaining how housing plays a role in a greater "opportunity structure").

99. *See id.* For a discussion by the Supreme Court of one common form of maintaining segregation by encouraging homebuyers to purchase properties in segregated neighborhoods, a practice known as steering, see *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 94 (1979).

100. *See generally* powell, *supra* note 98.

More than simply a physical place, the home is an embodiment of myriad intangible traits that are personally and culturally revered: identity, family, refuge from the pressures of public life, a place to relax, recoup, and rejuvenate.[101] "All told, the home—physical space, cultural icon, vehicle for wealth accumulation, and mode of access to desired communities—is an American symbol of unique power."[102] From an appreciation of the privileged status of the home in both our legal system and our culture comes the deduction that an injury inflicted in this cherished place twice offends: once in the act itself against the injured party, and once again as a breach of our intimate veneration for the home itself. In this way, the sexual harassment of women in their homes violates not only their right to be free from discrimination, but also deprives them of their most fundamental and precious haven from abuse.

B. The Exceptional Vulnerability of the Class of Victims Predominantly Affected by Sexual Harassment at Home Merits Unique Treatment.

The intersection of sex, race, and class renders low-income women and women of color, especially those with children, particularly vulnerable to sexual harassment by housing providers.[103] Rental housing inherently implicates issues of economic status.[104] Logically, if one owns her own home, she is not

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101. *See* Adams, *supra* note 2, at 21-26 (providing a comprehensive analysis of the home as a "cultural signifier and idealized symbol [that] evokes powerful associations").

102. *Id.* at 28.

103. *See* Adams, *supra* note 2, at 35-38, discussing how sexism, racism, and classism work in conjunction to compound the oppression of low-income women of color in particular:

> Race and ethnicity are powerful indicators of the ability to enter freely a particular housing market. As a general matter, the darker the skin color of the housing seeker, the more constrained that seeker's options will be . . . . But the final gloss on all of these factors is the relationship between gender and poverty.

Id. A brief survey of the federal residential sexual harassment cases from which the race of the plaintiff can be determined corroborates this. *See, e.g.*, Reeves v. Carrollsburg Condominium Unit Owners Ass'n, No. 96-2495 (RMU), U.S. Dist. LEXIS 21762, at *3 (D.D.C. Dec. 18, 1997) (plaintiff is an African American woman; defendant harasser is a White man); Krueger v. Cuomo, 115 F.3d 487, 490 (7th Cir. 1997) (same); New York *ex rel.* Abrams v. Merlino, 694 F. Supp. 1101, 1102 (two of the four plaintiffs are African American women, defendant harasser is a White man).

104. "Whether it is White, Black, or Hispanic, a female-headed family with children is less likely to own its home than any other type of family of the same

subject to a landlord conditioning her housing on compliance with sexual demands or acquiescence to hostility based on her sex. However, home ownership is expensive and thus unattainable for many low-income people.[105] Therefore, excepting situations in which people seek rental housing due to periods of transition, the majority of renters are low-income persons for whom home ownership is not an available option.[106]

Of low-income people as a group, the overwhelming majority are women.[107] Referred to as the "feminization of poverty,"[108] women as a class are growing increasingly poor.[109] Furthermore,

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race or ethnicity . . . . Women who head families with children account for a much higher percentage of female householders who rent (38.3 percent) than of those who own (20.2 percent)." THE AMERICAN WOMAN 1996-97: WOMEN AND WORK 314, 322-23 (Cynthia Costello & Barbara Kivimae Krimgold eds., 1996) [hereinafter AMERICAN WOMAN] (citing Bureau of the Census, *Household and Family Characteristics: March 1993*, 1994, Table 16).

105. HUD notes the polarization between increasing homeownership rates and the critical lack of affordable rental housing. *See* Department of Housing and Urban Development, *The State of Our Cities* (visited Nov. 5, 1999) <http://www.huduser.org/publications/polleg/New-tsoc99/part2-3.html>. Homeownership rates, even in urban areas, exceed 50%, which is the highest they have ever been. *See id.* However, homeownership rates in suburban areas are a substantially higher 70%. *See id.* "While our homeownership record is improving, shortages of affordable rental housing are worsening. An estimated 5.3 million households have worst case housing needs—worst case needs most often being where more than half a family's income goes to rent." *Id.*; *see also* Adams, *supra* note 2, at 34 n.66 (pointing out that because renters make less money than homeowners, they pay a high proportion of their incomes to rent and thus have difficulty saving enough money for a down payment on a home).

106. *See* Adams, *supra* note 2, at 33-34 & n.68 (stating that even discounting those who rent due to temporary circumstances, or because they prefer the convenience of not owning, the majority of renters rent "because home ownership is not a realistic economic option for them. Women form a large portion of this market for rental housing, and are 'the fastest growing segment of the homeless and ill-housed in our nation.'" (citing the NATIONAL LOW INCOME HOUS. COALITION, 1997 ADVOCATE'S RESOURCE BOOK 19 (1997)).

107. *See* AMERICAN WOMAN, *supra* note 104, at 314 (citing Bureau of Census, unpublished data from the Current Population Survey, March 1994):

> Women are more likely than men to live in poverty at all ages past childhood. By the time a woman is 65 years old, she is almost twice as likely as her male counterpart to be living in poverty. Nearly one-third of all black women and 29 percent of Hispanic women live below the poverty level; about one in five men in these groups is also poor.

Id.

108. Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, URB. & SOC. CHANGE REV., Winter-Spring 1978, at 28 (discussing the economic and social consequences of being female that result in higher rates of poverty; frequently cited as coining the term "feminization of poverty").

109. *See, e.g.*, Adams, *supra* note 2, at 37 ("Whether one wishes to label the problem the 'feminization of poverty' or not, women clearly earn less income and possess less wealth than men and thus are poorer as a class, and women who head

poverty rates increase exponentially once race is factored into the equation.[110] Finally, if a woman—particularly a woman of color—is the head of a household that includes children, she is virtually destined to live below the poverty level.[111] This statistical reality is consistently demonstrated throughout the body of case law dealing with residential sexual harassment.[112] It is therefore impossible to ignore the composition of those primarily affected by sexual harassment in housing: women of color struggling to raise their children in situations of dire poverty.[113]

C. Sexual Harassment in the Home is Essentially Criminal Conduct.

To appreciate the need for applying a higher standard for sexual harassment in housing, it is necessary to comprehend not only those affected, but also the exact nature of the conduct constituting harassment. The current system of addressing sexual harassment in both employment and housing fails to appreciate conduct that is essentially criminal in nature.[114] The degree of

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households with dependent children have extremely high poverty rates.").

110. *See, e.g.*, Zalesne, *supra* note 89, at 886) ("In employment discrimination cases, the victim of sexual harassment is usually a woman, and often a minority. When sexual harassment occurs in the housing context, however, the typical victim is not only a minority woman, but a *poor* minority woman.").

111. "When a family with children is headed by a woman, the odds that it is in poverty approach one in two; 46 percent of female-headed families with children were poor in 1993." AMERICAN WOMAN, *supra* note 104, at 316.

112. For example, the plaintiffs in *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997), *Doe v. Maywood Hous. Auth.*, No. 93-C2865, 1993 WL 243384 (N.D. Ill. July 1, 1993) (mem.), and *Grieger v. Sheets*, No. 87-C6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989) (mem.), were recipients of Section 8 housing subsidies; the plaintiff in *Honce v. Vigil*, 1 F.3d 1085, 1094 (10th Cir. 1993) was in "severe financial straits"; and the plaintiffs in *Woods v. Foster*, 884 F. Supp. 1169 (N.D. Ill. 1995), were homeless women staying in a shelter.

> Although it is difficult to determine with absolute certainty the racial background of the plaintiffs in the relevant cases, several salient facts about them are known: they are women; many of these women are the sole financial support for their families; they are renters and at least some of them are homeless or facing homelessness.

Adams, *supra* note 2, at 35.

113. *See* Zalesne, *supra* note 89, at 884 ("As a result of the traditional subordination of minority women and the current rental housing shortage, low-income minority women are most susceptible to domination by their landlords.").

114. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1009 (7th Cir. 1996) (holding that landlord's solicitation of sex in exchange for rent from female tenant, combined with unwanted touching, was not sufficiently egregious to be actionable as sexual harassment); *see also* Carlotta Roos, *DiCenso v. Cisneros: An Argument for Recognizing the Sanctity of the Home in Housing Sexual Harassment Cases*, 52 U. MIAMI L. REV. 1131 (1998) (explaining how the *DiCenso* case exemplifies the court's

criminality is exacerbated when considered in light of the demographics of the victims of such conduct.[115] This is not to say that the sexual harassment of a White, upper-income female tenant is somehow less wrong; indeed, sexual harassment in all its perverse forms is an intolerable offense against the civil rights of women, individually and collectively. However, when circumstances render a victim especially vulnerable to the harassing conduct, and exploitation of this vulnerability is inherent to commission of the act, the harassment thus incorporates the status of the victim into an element of the offense. In other words, the fact that victims of residential sexual harassment are predominantly poor women of color is not coincidental, but essential.[116]

The argument in favor of a heightened standard for sexual harassment in the home is substantiated by consideration of the criminal nature of such conduct.[117] Often the underlying conduct of residential sexual harassment claims may be actionable in criminal proceedings, as well as a civil claim under the FHA.[118] A

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failure to address the severity of sexual harassment in the home).

115. *See supra* notes 103-113 and accompanying text.

116. *See, e.g.*, Adams, *supra* note 2, at 20 (stating that "women who are renters face additional obstacles that compromise their ability to be 'free' in the home *because of who they are and what they earn*") (emphasis added).

117. *See* Carrie Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. J. 213 (Dec. 1994) (arguing that quid pro quo sexual harassment should be treated as a crime). Baker contends that "[t]he crime of quid pro quo sexual harassment should be called sexual extortion in order to distinguish it from hostile environment harassment." *Id.* at 247. "Recently, three states have explicitly criminalized sexual harassment, and the military has used criminal sanctions against sexual harassment." *Id.* at 214. These three states are Delaware, North Carolina, and Texas. *See id.* at 214 n.7. The North Carolina law, enacted in 1989, prohibits lessors of real property or their agents from sexually harassing lessees or prospective lessees. *See id.* at 245 n.214 (citation omitted). However, Baker's article proposes criminalizing only quid pro quo harassment, and thus fails to acknowledge the severity of claims of hostile housing environments.

118. For example, sexual harassment frequently involves conduct that inherently implicates criminal law, particularly rape law and extortion. Liberal construction of several provisions of the Model Penal Code would certainly encompass harassing conduct in the housing context. *See, e.g.*, MODEL PENAL CODE § 213.1(2)(a) (Proposed Official Draft 1962), *reprinted in* SANFORD KADISH AND STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1127 (6th ed. 1995) (Gross Sexual Imposition); *id.* § 223.4 (Theft by Extortion); *id.* § 223.7(1) (Theft of Services, which may apply in a jurisdiction in which prostitution has been legalized); *id.* § 212.5 (Criminal Coercion); *id.* § 213.2 (Deviant Sexual Intercourse by Force or Imposition); *id.* § 213.4 (Sexual Assault). Even where the threat is unfulfilled, criminal sanction would be applicable per the law of criminal attempt. *See id.* § 5.01 (Criminal Attempt). Furthermore, much of the conduct comprising hostile housing environment claims is illegal under relevant criminal harassment statutes. *See, e.g., id.* § 250.4 (Harassment).

multitude of literature discusses various legal theories under which a threat of harm other than bodily injury made for the purpose of obtaining sex constitutes a criminal act.[119] Indeed, the explicit or implicit threat of eviction and consequent likelihood of homelessness that underlies landlords' propositions that their female tenants substitute sexual acts for payment of rent constitutes an outrageous injury in both material and dignitary terms.

Especially relevant to residential sexual harassment is the power dynamic in the relationship between the landlord and tenant, as compounded by the context of the home.[120] Since the landmark cases of *Javins v. First Nat'l Realty Corp.*[121] and *Williams v. Walker-Thomas Furniture Co.*,[122] courts have recognized that landlords have substantial bargaining power over their tenants, and thus it is necessary for courts to protect against abuse of this power.[123] The ultimate power of the landlord over

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119. *See, e.g.*, STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW (1998) (arguing that the current American legal system fails to protect one's right to sexual autonomy). As the exchange of sex for rent constitutes prostitution, a particularly astute analysis of the ways in which prostitution maintains the subordination of women is found in Bevery Balos and Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (1999).

120. *See* Zalesne, *supra* note 89, at 882 ("Like sexual harassment in the workplace, sexual harassment in rental housing rests on the imbalance of power. Landlords, almost by definition, have significant power over their tenants."); *see also* Susan Etta Keller, *Does the Roof Have to Cave In? The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663, 1664-73 (1988) (describing the interrelated factors that affect the disparity in power between the landlord and tenant). The inequality of bargaining power is arguably more profound given that the landlord-tenant relationship is predicated on the fundamentally personal and intimate setting of the home. *See infra* Part II.A. Indeed, a number of criminal acts are treated as distinct precisely because they are committed against family or household members, recognizing how the context and nature of the relationship between victim and perpetrator intensifies the criminality of the act. *Compare*, MINN. STAT. § 609.2242 (1999) (Domestic Assault in the Fifth Degree), *with* MINN. STAT. § 609.224 (1999) (Assault in the Fifth Degree).

121. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970) (establishing the implied warranty of habitability).

122. 350 F.2d 445 (D.C. Cir. 1965) (holding that a consumer contract was unconscionable based on a gross disparity in bargaining power). The theory of unconscionability has been repeatedly applied to contracts for rental housing, and lease terms found unconscionable may be held unenforceable. See, e.g., Ramirez-Eames v. Hover, 108 N.M. 520, 775 P.2d 722 (N.M. 1989) (analyzing residential lease term per theory of unconscionability); In re Estate of Hoffbeck, 415 N.W.2d 447 (Minn. Ct. App. 1987) (same).

123. *See* Zalesne, *supra* note 89, at 889-901 (proposing that certain conduct by landlords constitutes sexual harassment per se, and that there should be a

the tenant is the mechanism of eviction,[124] which carries with it not only the immediate consequence of forced relocation or homelessness, but also the long-term damage to that tenant's rental history which may disable her from qualifying for replacement housing.[125]

However, eviction is not the only tool of control a landlord has over his tenants. Particular to instances of residential sexual harassment is the omnipresent threat of future, more egregious harm due to the fact that the landlord has unrestrained access to the tenants' apartment.[126] At any time, the landlord could use his passkey to enter the victim's apartment and further assault her.[127] The knowledge of this potentiality inevitably influences the victim's response to the episodes of harassment, as she must fear for her safety in her own home.[128] Thus, landlords who harass their female tenants through sexual demands and sex-based hostility are exploiting both their economic dominance and their unrestrained access to their victims.

Additionally, principles of criminality justify treating sexual

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heightened standard for landlords who sexually harass their tenants due to the disparity in bargaining power).

124. For an insightful discussion of the process of eviction and its associated costs to both landlords and tenants, see Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385 (1995).

125. Landlords are increasingly employing tenant screening agencies to screen rental applicants' rental, credit and criminal histories, a practice which has given rise to litigation regarding the procedures these agencies follow in compiling their reports. *See, e.g.*, Wilson v. Rental Research Servs., Inc., 165 F.3d 642, 646-47 (8th Cir. 1999) (holding that tenant screening companies must use reasonable procedures to ensure the maximum accuracy of its reports, and noting that landlords have little incentive to rent to applicants whose reports indicate prior evictions, regardless of the underlying circumstances, particularly in light of the lack of affordable housing and subsequent increase in demand for housing units).

126. *See, e.g.*, Ponticas v. K.M.S. Inv., 331 N.W.2d 907, 911 (Minn. 1983) (upholding jury verdict finding apartment management company negligent in failing to make a reasonable investigation into the resident manager's background before providing him with a passkey, which he used to gain access to a tenant's home, where he raped her).

127. *See id.* at 909.

128. One court deciding a residential sexual harassment case has acknowledged the impact of women's fear of violence on their perceptions of sexually harassing conduct: "Notably, women remain disproportionately vulnerable to rape and sexual assault, which can and often does shape women's interpretations of words or behavior of a sexual nature, particularly if unsolicited or occurring in an inappropriate context." Beliveau v. Caras, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995); *see also* Ellison v. Brady, 924 F.2d 872, 879-80 (9th Cir. 1991) (noting that because women are disproportionately the victims of sexual assault, they are legitimately more concerned with sexual behavior and may perceive sexual harassment as a prelude to more severe assaults).

harassment as a crime: while civil law protects private rights, criminal law deals with protecting the general public from harm.[129] As sexual harassment is a form of sex discrimination specifically intended to reinforce sex roles and perpetuate the subordination of women,[130] it is thus an offense against women as a group, and indeed against society as a whole.[131] The harassment of women tenants because of their actual or perceived vulnerability as women objectifies them as fair targets for landlords' wanton sexual advances, causes them to live in a constant state of fear and eliminates any hope for a haven free from offensive sex-based degradation. Sexual harassment in the home involves conduct that is criminal not only in raw abstract form, but also when considered against the backdrop of the power dynamic inherent in the landlord-tenant relationship, theories of criminality, and its impact on women as a collective social group.

A survey of the conduct constituting harassment in the cases addressed by federal courts to date leaves no doubt that it is both civilly wrong and dangerously criminal. The acts alleged are by no means ambiguous or subject to debate over their unwelcomeness or severity. To wit, the conduct reported in *Reeves v. Carrollsburg Condominium Unit Owners Ass'n*[132] included "a threat of lynching and the utterances of revolting racist and sexist epithets as well as written notes of a racist and sexist nature."[133] The plaintiff therein alleged that the defendant, a resident of the same condominium that she lived in, "physically intimidated her and threatened to rape and kill her."[134] In *Grieger v. Sheets*,[135] the

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129. *See* Baker, *supra* note 117, at 226-38.

> [P]rivate wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community considered as a community, in its social aggregate capacity.

Id. at 227 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1428 (1897)). Baker contends, however, that this distinction is ambiguous, as it is the community itself that comes to a consensus as to what behavior it will condemn as criminal. *See id.* at 227-28.

130. *See generally* MACKINNON, *supra* note 2 (discussing sexual harassment as a social phenomenon). *See also* Baker, *supra* note 117, at 231 (paraphrasing MacKinnon: "In other words, sexual harassment reinforced a social hierarchy in which women as a group occupied a structurally inferior and distinct place").

131. *See* Baker, *supra* note 117, at 233 ("Sexual harassment deprives many women of an equal opportunity to pursue an occupation, education, housing, and other critical pursuits free from the sexual demands of those in power.").

132. No. 96-2495 (RMU), U.S. Dist. LEXIS 21762, at *1 (D.D.C. Dec. 18, 1997).

133. *Id.* at *3.

134. *Id.* at *4.

conduct by the landlord included damage to property and threats to shoot the victim's boyfriend.[136] *Woods v. Foster*[137] was a suit by three homeless women who alleged that they were subjected to repeated "sexual advances, lewd touching of their bodies, sexually suggestive remarks and requests for sexual favors" by the executive director and the pastor of the church that ran the shelter where the women sought refuge.[138] In *US v. Presidio Investments, Ltd*,[139] the plaintiff's landlord grabbed and kissed her on a number of occasions.[140] In one instance, "[Defendant] Sandquist grabbed [Plaintiff] Blair and pinned her arms behind her back. While squeezing her neck and forcing her face upwards with his left hand, Sandquist forcibly kissed her, cutting her lip and bruising her neck."[141] It is obvious that the underlying conduct on which existing residential sexual harassment claims are founded warrants severe legal condemnation. Such conduct becomes all the more outrageous and reprehensible when perceived in context: the offenses took place in these women's homes.

D. A Number of Federal Courts Have Addressed the Need for Distinct Treatment of Sexual Harassment in Housing Cases.

A handful of federal court decisions have notably supported the contention that sexual harassment in housing is conceptually distinct and therefore deserves a particularized standard accommodating the differences between it and harassment in the workplace. The first of these cases to acknowledge the discrepancy in the analogy between Title VII and Title VIII was *Beliveau v. Caras*[142]:

> One commentator has suggested that sexual harassment in the home is in some respects more oppressive: "When sexual harassment occurs at work, at that moment or at the end of the work day, the woman may remove herself from the offensive environment. She will choose whether to resign from her position based on economic and personal considerations. In

135. 689 F. Supp. 835 (N.D. Ill. 1988).

136. *See id.* at 836.

137. 884 F. Supp. 1169 (N.D. Ill. 1995).

138. *Id.* at 1171 (One plaintiff submitted to the demand for sex "because she was fearful that she would be forced to leave the Shelter if she did not.").

139. 4 F.3d 805 (9th Cir. 1993).

140. *See id.* at 806.

141. *Id.* The plaintiff filed a criminal complaint against the defendant, who was consequently convicted of assault in city court. *See id.*

142. 873 F. Supp. 1393 (C.D. Cal. 1995).

> contrast, when the harassment occurs in a woman's home, it is a complete invasion in her life. Ideally, home is the haven from the troubles of the day. When home is not a safe place, a woman may feel distressed and, often, immobile."[143]

Subsequently, two other residential sexual harassment cases have reiterated this distinction.[144] This support suggests that at least a few federal courts are willing to hold that sexual harassment in the home is inherently more egregious than the same or similar conduct when it occurs in the workplace.[145] Recognition of this fact would lead to holding offenders to a higher standard of conduct, and would likewise lower the threshold of what constitutes sufficiently severe or pervasive harassment to succeed on a hostile environment claim when applied to sexual harassment in the home.

E. Recent Developments in Sexual Harassment Jurisprudence Have Failed to Address the Recurring Conflicts in Residential Sexual Harassment Decisions.

1. The Complex Vicarious Liability Analysis Is Rarely Applicable In Residential Sexual Harassment Cases.

In 1998, the Supreme Court issued decisions in two separate sexual harassment cases,[146] stating that its purpose was "to

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143. *Id.* at 1397 n.1 (quoting Cahan, *supra* note 37, at 1073).

144. *See* Williams v. Poretsky Management, 955 F. Supp. 490, 498 (D. Md. 1996) (citing *Beliveau*, 873 F. Supp. at 1397 n.1.) ("In addition, as the plaintiffs point out, although courts have looked to employment cases to determine housing claims, the settings are not completely analogous. At least one court has recognized that sexual harassment in the home may have more severe effects than harassment in the workplace."); Reeves v. Carrollsburg Condominium Unit Owners Ass'n, No. 96-2496 (RMU), 1997 U.S. Dist. LEXIS 21762, at * 21 (D.D.C. Dec. 18, 1997) (citing *Beliveau*, 873 F. Supp. at 1397 n.1) ("It is noteworthy that at least one court has recognized that sexual harassment in the home may have more severe effects than harassment in the workplace.").

145. In addition to the few cases expressly citing the Cahan article quoted in *Beliveau*, see *supra* note 144, other courts have recognized the inherent severity of sexual harassment in the home. *See, e.g.*, Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997), stating:

> It demands little in the way of either empathy or imagination to appreciate the predicament of a woman who is harassed in full view of her children, whose home becomes not a sanctuary but the situs of her torment, and who concludes that she has no alternative but to leave a long sought-for apartment.

Id. at 492.

146. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlingon Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

address the divergence"[147] among the circuit courts and "to assist in defining the relevant standards of employer liability."[148] The recent decisions in *Ellerth* and *Faragher* dealt primarily with the issue of employer liability, i.e., whether and when an employer can be held responsible for the sexually harassing conduct of its supervisory employees.[149] Transposed to the realm of sexual harassment in housing, however, such scrutiny of assignment of liability of the owner to the residence is misplaced. Contrary to the frequent controversy over whether a supervisor's acts of sexual harassment may be imputed to the employer, vicarious liability is rarely disputed in cases of residential sexual harassment. This fundamental incongruity stems directly from the distinction between the employment and housing contexts.

First, in contrast to Title VII, the FHA expressly provides for individual liability by defining "person" to include not only business entities but also "individuals."[150] Therefore, harassers

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147. *Faragher*, 524 U.S. at 786. The discord among the various jurisdictions is perhaps epitomized by the opinions of the Court of Appeals of the Seventh Circuit, from which the Supreme Court granted certiorari to review the *Ellerth* case. *See Ellerth*, 524 U.S. at 749. The Court of Appeals reversed the district court's grant of summary judgment to Burlington, yet its decision produced eight separate opinions and no consensus for a controlling rationale. *See id.*

148. *Ellerth*, 524 U.S. at 751. Despite the Court's intentions, the lower courts are still in a state of disarray when deciding sexual harassment claims. *See*, Hegre & Engelmeier, *supra* note 77, at 35.

149. *See supra* notes 64-69 and accompanying text.

150. *See* 42 U.S.C. § 3602(d) (1999). "'Person' includes *one or more individuals*, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." (emphasis added). *Cf.* 42 U.S.C. § 2000e-2(a) (1999):

> It shall be an unlawful employment practice for *an employer* to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. (emphasis added).

Case law has repeatedly held that Title VII does not authorize individual liability, as its anti-discrimination provisions apply only to employers. *See, e.g.*, Haynes v. Williams, 88 F.3d 898, 899 (10th Cir. 1996) (holding that Title VII does not provide for individual liability); Williams v. Banning, 72 F.3d 552, 553 (7th Cir. 1995) (same); Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 379-80 (8th Cir. 1995) (same); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993) (holding that Title VII does not provide for individual liability). Furthermore, the fact that Title VII applies only to employers with fifteen or more employees evidences a congressional intent not to subject small entities to liability for discrimination. *See* 42 U.S.C. § 2000(b). "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." *Miller*, 991 F.2d at 587.

themselves may be found personally liable under the FHA, in stark contrast with the limitation of Title VII to only vicarious liability of the employer as principle.[151] Additionally, as evidenced in the majority of residential sexual harassment claims addressed in federal courts, vicarious liability is infrequently controverted because the owner/landlord and the harasser are often one and the same person.[152] There is rarely any attenuation in the chain of command necessitating an analysis of whether the harasser was acting within the scope of the authority granted by the landlord simply because the harasser is in fact usually the sole authority.[153] Furthermore, the provision of the FHA that makes it unlawful to coerce, intimidate, threaten, or interfere with the exercise or enjoyment of any right protected by the FHA has no parallel in Title VII, and thus provides a cause of action exclusive to Title VIII.[154] Finally, the duty not to discriminate in housing is non-delegable, as courts have consistently held.[155] Therefore, while

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151. *See, e.g.*, City of Chicago v. Matchmaker Real Estate Sales Ctr., 982 F.2d 1086, 1096 (7th Cir. 1992) (holding individual real estate agents, as well as owner of company, liable for racial steering in violation of Section 3604 of the FHA); Jeanty v. McKey & Poague, Inc., 496 F.2d 1119, 1120-21 (7th Cir. 1974) (holding employees of rental management company individually liable for violations of FHA); United States v. Lorantffy Care Ctr., 999 F. Supp. 1037, 1045 (N.D. Ohio 1998) (stating in dicta that nursing home employees could be held individually liable for violations FHA); United States v. Sea Winds of Marco, Inc., 893 F. Supp. 1051, 1055 (M.D. Fla. 1995) (stating that condominium employees could be held individually liable for violations of FHA).

152. *See* cases cited *supra* note 35. Of these, only three involved a dispute over vicarious liability. *See* Williams v. Poretsky Management, 955 F. Supp. 490, 496-97 (D. Md. 1996); Woods v. Foster, 884 F. Supp. 1169, 1178 (N.D. Ill. 1995); and Bethisou v. Ridgeland Apartments, No. 88-C5256, 1989 U.S. Dist. LEXIS 11986, at *3 (N.D. Ill. Sep. 28, 1989) (mem.). In each of these cases, the owner or management company was held liable for harassment by its agent.

153. While this fact precludes contentious dispute over vicarious liability, it likewise constitutes a substantial obstacle for victims of harassment, creating a self-referential conundrum: when the perpetrator is the sole proprietor of the property, to whom can the tenant turn for effective recourse without jeopardizing her safety and stability?

154. *See* 42 U.S.C. § 3617 (1999); *see also supra* note 33 and accompanying text.

155. *See, e.g.*, Walker v. Crigler, 976 F.2d 900, 904 (4th Cir. 1992) ("Here we adopt the general rule applied by other federal courts that the duty of a property owner not to discriminate in the leasing or sale of that property is non-delegable."); Green v. Century 21, 740 F.2d 460, 465 (6th Cir. 1984) ("[A] principal cannot free himself of liability by delegating a duty not to discriminate to an agent."); Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974) (quoting favorably United States v. Youritan Const. Co., 370 F. Supp. 643, 649 (N.D. Cal. 1973)) ("The discriminatory conduct of an apartment manager or rental agent, is as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of *respondeat superior* and because the duty to obey the law is non-delegable."); Saunders v. General Servs. Corp., 659 F. Supp. 1042, 1059 (E.D. Va. 1986)

Ellerth and *Faragher*, as well as the subsequent amendments to EEOC policy, may have a substantial impact on sexual harassment in the employment context, their applicability to the arena of residential sexual harassment is confined by both the difference in scope between Title VII and Title VIII and the factual circumstances of the cases.

2. The Court's Recent Developments Do Not Address The Most Problematic Element Of Residential Sexual Harassment: The "Severe Or Pervasive" Requirement.

The usefulness of the discussion of the new employer/owner liability framework to cases of sexual harassment in housing is further limited by its own terms: liability becomes relevant only after the harassment is proven.[156] Inasmuch as *Ellerth* and *Faragher* did not directly address other material issues inherent in sexual harassment litigation, the former standards remain undisturbed—as do the many conflicts they generate.[157] Of these, with regard to housing, the most precarious remains determining what type and degree of harassment satisfies the "severe or

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(citations omitted) ("Under the Fair Housing Act, a corporation and its officers 'are responsible for the acts of a subordinate employee . . . even though these acts were neither directed nor authorized.' . . . Courts have followed this rule even where 'it seems harsh to punish the innocent and well-intentioned employers' because the statutory duty not to discriminate is non-delegable."). This principle has been addressed and enforced in the context of residential sexual harassment. *See, e.g., Williams*, 955 F. Supp. at 496-97 ("Indeed, in many circumstances under the Fair Housing Act, the duty not to discriminate is non-delegable, and an employer may be held responsible for the discriminatory conduct of his employees, even though the conduct was not authorized.").

156. *See* Burlington Indus., Inc., v. Ellerth, 524 U.S. at 742, 753-54(1988):

> When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.

Id.

157. The requirements of both quid pro quo and hostile environment claims have been the subject of substantial debate, not only in scholarly publications but also in the courts themselves. *See, e.g.*, Adams, *supra* note 2, at 42 n.111 (discussing how courts have struggled in determining what constitutes actionable sexually harassing conduct). For example, compare *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986, *cert. denied*, 481 U.S. 1041 (1987), holding that repeated sexual remarks and pin-up posters did not create a hostile environment severe enough to affect plaintiff's psychological well-being and thus were not actionable, with *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991), holding that it is the harasser's conduct that must be severe or pervasive from the perspective of a reasonable woman, not the alteration in conditions of employment.

pervasive" requirement to establish an actionable hostile housing environment.[158] The noticeable absence of consideration of this requirement in the *Ellerth* and *Faragher* decisions leaves unanswered the critical question plaguing residential sexual harassment cases: how much harassment must a woman tenant withstand before her claim is deemed actionable?[159]

The residential sexual harassment case that exemplifies the current failure to appreciate the inherently severe nature of harassment that occurs in one's home is *DiCenso v. Cisneros*.[160] Defendant DiCenso went to Plaintiff Brown's apartment to collect the rent, then began rubbing her arm and back, saying that if she couldn't pay it, she could take care of it in other ways.[161] When Brown slammed the door on him, DiCenso stood outside her door

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158. The "severe or pervasive" prong of the *prima facie* hostile environment claim is of course not the only obstacle faced by victims of environmental sexual harassment. *See generally* Oshige, *supra* note 56 (proposing that the hostile work environment cause of action be reconfigured as gender-based disparate treatment). A plaintiff must also prove that the conduct was unwelcome; that it was of a sexual nature; and that it was not only subjectively severe and pervasive enough to unreasonably alter her working or housing conditions, but also would have done so for an allegedly objective *reasonable person* in her situation. *See id.* at 566 (emphasis in original). *But see Ellison*, 824 F.2d at 872 (applying reasonable woman standard). Furthermore, the very process of bringing a claim against the harasser subjects plaintiffs to the burden of proving this rigorous prima facie test, and forces them to "endure degrading and humiliating inquiries about their sexual histories, as defendants attempt to cast them as unworthy of protection by Title VII." Oshige, *supra* note 56, at 566:

> Under the perverse structure of current law, a female employee who brings criminal rape charges against her supervisor is protected from such inquiries in a criminal trial. But a woman who brings a civil suit for hostile work environment against her supervisor based on the same conduct may expect every aspect of her life—from past boyfriends to her dress to her sense of humor—to be fair game for discovery and manipulation before a trier of fact.

Id.

159. Compare this inquiry to the rhetorical question posed by the Court in Faragher v. City of Boca Raton, 524 U.S. 775 (1998): "How far from the course of ostensible supervisory behavior would a company officer have to step before his orders would not reasonably be seen as actively using authority?" *Id.* at 805. While the context of the Court's question was a discussion regarding the problematic distinction between an affirmative misuse of supervisory authority and a merely an implicit misuse, its own answer raises myriad other, more problematic issues: "Judgment calls would often be close, the results would often seem disparate even if not demonstrably contradictory, and the temptation to litigate would be hard to resist." *Id.*

160. 96 F.3d 1004, 1008-09 (7th Cir. 1996) (holding that the landlord's conduct was not sufficiently egregious to create an objectively reasonable hostile housing environment). *See also* Roos, *supra* note 114, at 1139-46 (analyzing the *DiCenso* case in light of a "sanctity of the home" doctrine).

161. *See Dicenso*, 96 F.3d at 1006.

shouting names at her, including "bitch" and "whore."[162] Months later there was a dispute over the rent and DiCenso served Brown with an eviction notice.[163] The Seventh Circuit Court reviewed the issue *de novo* and concluded that the single instance of harassment was not sufficient to state a cause of action under a hostile housing environment theory; consequently, the Court reversed the decision of the HUD Secretary's designee.[164] The Court stated:

> DiCenso's conduct, while clearly unwelcome, was much less offensive than other incidents which have not violated Title VII. DiCenso's comment vaguely invited Brown to exchange sex for rent, and while DiCenso caressed Brown's arm and back, he did not touch an intimate body part, and did not threaten Brown with any physical harm. There is no question that Brown found DiCenso's remarks to be subjectively unpleasant, but this alone did not create an objectively hostile environment.[165]

The factors referred to by the court, namely the frequency and severity of the conduct, and whether the harasser touched an *intimate* body part, are taken from the Supreme Court's opinion in *Harris v. Forklift Systems, Inc.*[166] However, these enumerated

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162. *See id.* Interestingly, the exact language DiCenso used against Brown has been held to constitute proof of the element of gender animus in claims under the Violence Against Women Act, 42 USC § 13981. Julie Goldscheid, *Proving Gender Motivation in Civil Rights Remedy Claims Under the Violence Against Women Act*, CLEARINGHOUSE REV. 567, 569-72 (Mar.-Apr. 1999) (discussing how sex-based epithets may serve as proof of gender motivation). *See, e.g.*, Ziegler v. Ziegler, 28 F. Supp. 2d 601, 606 (E.D. Wash. 1998) (stating that proof of gender-motivation is to be determined by the totality of the circumstances as it is for race or sex discrimination, and that Title VII cases provide substantial guidance in assessing whether the alleged conduct is based on gender). *But cf.* Hedberg v. Rockford Stop-N-Go, Inc., No. 97-C50367, 1999 U.S. Dist. LEXIS 7007, at *9 (N.D. Ill. Apr. 27, 1999) (stating that defendant's use of the expletive "bitch" was not inherently sexual in character).

163. *See DiCenso*, 96 F.3d at 1006. Brown then filed a HUD complaint for sexual harassment, which DiCenso claimed was a ploy to avoid paying rent. *See id.* HUD investigated the complaint and charged DiCenso with violating the FHA. *See id.* An Administrative Law Judge (ALJ) concluded that DiCenso's conduct did not rise to the level of severity require to create a hostile housing environment and dismissed the complaint. *See id.* at 1006-07. HUD sought review on Brown's behalf, and the Secretary's designee affirmed the ALJ's findings of fact but ruled instead that the single incident was sufficient to constitute creation of a hostile environment. *See id.* at 1007. Brown received an award of damages, and DiCenso appealed to the Seventh Circuit Court. *See id.*

164. *See id.* at 1008-09.

165. *Id.* at 1008-09.

166. 510 U.S. 17, 21-23 (1993) (emphasis added) (stating that "whether an environment is hostile or abusive can be determined only by looking at all relevant circumstances, including the frequency of the discriminatory conduct; its severity;

factors were not intended to be dispositive, but rather were named only as suggestions in a non-exhaustive list regarding the necessity of considering all the circumstances surrounding the harassment in order to determine whether it is severe or pervasive.[167] The *DiCenso* court conceded that the harassment occurred; however, it nonetheless refused to redress it, a result that could have been prevented had there been a clear standard acknowledging the inherent severity of sexual harassment in one's own home.

While the *DiCenso* court held that the landlord's extortionate request "to exchange sex for rent," coupled with his shouting sexist epithets, was not sufficiently severe so as to be actionable because it was only one incident, other courts have held otherwise.[168] For example, the cogent opinion in *Beliveau v. Caras* emphasized the role of the context of the home in assessing the severity of the harassing conduct:

> Particularly where, as here, the alleged battery was committed (1) in plaintiff's own home, where she should feel (and be) less vulnerable, and (2) by one whose very role was to provide that safe environment, defendants' contention that plaintiff has failed to allege conduct that was so severe or pervasive to alter the conditions of plaintiff's housing environment and has failed to allege an abusive housing environment resulting from defendants' conduct is not well-taken. There are few clearer examples of classic sexual harassment than an unpermitted, allegedly intentional, sexual touching. Under no circumstances should a woman have to risk further physical jeopardy simply to state a claim for relief under Title VIII.[169]

The underlying fact situations of *DiCenso* and *Beliveau* are similar in that both involved one primary instance of harassing conduct that involved physical touching and sexual remarks.[170]

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whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance").

167. *See id.*

168. *See, e.g.*, Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995). However, the Supreme Court's decision in *Ellerth* explicitly states, "we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998).

169. *Beliveau*, 873 F. Supp. at 1398 (internal citations omitted).

170. *See id.* at 1395. *Beliveau* did involve some incidents prior to the ultimate offense. *See id.* After Plaintiff Beliveau noticed that Defendant Rickell, the resident manager, was staring at her while she was laying at the apartment pool in her bathing suit, Rickell began making unwelcome, offensive comments of a sexual nature to Beliveau. *See id.* Also during this time, Rickell went to Beliveau's apartment to repair her shower. *See id.* While there, he called for Beliveau to come into the bathroom where he was, put his arm around her, told her he would

However, the results are blatantly irreconcilable due to the respective courts' differing application of the relevant standards and, indubitably, the failure of the *DiCenso* court to consider the context of the home in its assessment of the severity of the harassing conduct in light of the surrounding circumstances, including the perspective of the victim.[171] Because the discrepancy among the lower federal courts deciding whether harassment is severe enough to be actionable was not addressed in the opinions of the recent Supreme Court cases dealing with sexual harassment, the erratic treatment of residential sexual harassment cases demonstrated in the foregoing comparison will continue.[172]

3. The New Tangible Action Standard Necessitates That Victims Suffer Either A Loss Of Housing Benefits Or A Repeated Pattern Of Harassment Before The Conduct Becomes Actionable.

Perhaps the most problematic aspect of the Supreme Court's recent decisions as applied in the context of the home is the Court's replacement of the former quid pro quo category with a new standard based on whether the victim of harassment suffered a "tangible employment action."[173] The Court in *Ellerth* explicitly stated that the terms quid pro quo and hostile environment are "of limited utility" and at best, functional in only a descriptive capacity.[174] Of particular concern to the Court was the use of

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like to keep her company any time, and made an explicit comment about her breasts. *See id.* When Beliveau pushed him away, he grabbed her breast. *See id.* She pushed him away again, then he grabbed her buttock as she left the room. *See id.* It is imperative to bear in mind that this assault took place in Beliveau's own home by a man with a key to her apartment.

171. *Cf.* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (adopting the reasonable woman standard for analyzing the severity of the harassing conduct).

172. See, for example, *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp.2d 870 (N.D. Ind. 1998), demonstrating one court's struggle to interpret and apply the holdings of *Ellerth* and *Faragher* while reconciling them with long-standing sexual harassment doctrine.

173. *See Ellerth*, 524 U.S. at 760 (describing what may be a tangible employment action).

174. *Id.* at 751. The Court further discounted the use of the distinction:

> '*Quid pro quo*' and 'hostile work environment' do not appear in the statutory text. The terms appeared first in the academic literature . . . ; found their way into decisions of the Courts of Appeals . . . ; and were mentioned in this Court's decision in *Meritor* (citation omitted). Nevertheless, as use of the terms grew in the wake of *Meritor*, they acquired their own significance . . . . We do not suggest that the terms . . . are irrelevant to Title VII litigation. To the extent they

these terms to classify unfulfilled threats made by a superior in conjunction with a sexual demand.[175] Herein lies the confusion of the Court, and the potentially grave consequence of its misapprehension.

On its face, a demand for sex under threat of some material change in employment is precisely a quid pro quo—literally, "this for that"—in that it coerces the employee to engage in sex or lose some favorable term of her employment.[176] In the context of housing, the proffered quid pro quo exchange is sex for rent, under threat of eviction or other detriment inherent in the power dynamic between landlord and tenant.[177] However, the term quid pro quo describes only the offer itself, i.e., compliance with a demand for sex in exchange for continued employment or housing. In other words, the term quid pro quo harassment defines the nature of the threat, not the consequence.[178] Therefore, whether

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> illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII .... When we assume discrimination can be proved, however, the factors we discuss below, and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability.

Id. The academic literature that the Court referred to is Catharine MacKinnon's SEXUAL HARASSMENT OF WORKING WOMEN, *see supra* note 2, the eminent text that established MacKinnon at the forefront of feminist jurisprudence regarding sexual harassment, then considered a revolutionary paradigmatic shift. The use of these terms was a means of describing the experience of harassment from the woman victim's point of view—i.e., *she* perceives the environment as hostile. *See, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (establishing the reasonable woman standard). In this way, the terminology allowed harassment to be defined from the perspective of the women affected by it. *See id.* The *Ellerth* Court's abandonment of the utility of these terms took the power of self-definition away from sexually harassed women, signifying its continued failure to appreciate harassing conduct as it impacts women, substituting the presumption that such harassment is insignificant unless its result is "tangible." This approach completely ignores the psychic and social costs of sexual harassment and its role in perpetuating the subordination of women.

175. *See Ellerth*, 524 U.S. at 754 (stating: "We must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill [them].").

176. BLACK'S LAW DICTIONARY 1248 (6th ed. 1990) (defining "quid pro quo").

177. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1009 (7th Cir. 1996) (stating explicitly that the landlord "invited Brown to exchange sex for rent.")

178. For a comprehensive explanation of the intended use and purpose of the terms "quid pro quo" and "hostile environment," see Brief for Respondent Mechelle Vinson at 9-11, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979) (internal citation omitted), which states:

> [T]he two recognized forms of sexual harassment are not a hard distinction. Rather, they are more like poles on a continuum that

the threat is fulfilled or not, the classification remains accurate as it refers only to the type of harassment, not the ensuing result.

However, the Court imposed the new tangible action standard to avoid attaching automatic liability for a quid pro quo threat where the employee or tenant refused to acquiesce in the sexual demand.[179] In effect, this new standard requires that the threat be somehow fulfilled, that it culminate in a tangible action, before the employer or landlord is subject to automatic liability for discrimination.[180] The underlying rationale is that the threat alone is not actionable or worthy of legal sanction, but only the "direct economic harm."[181] Absent this tangible result, the threat is relegated to the allegedly less egregious category of hostile environment, then subject to the rigorous scrutiny of whether it was sufficiently severe or pervasive.[182] Requiring that the harassment rise to some level of frequency or egregiousness thereby allows harassment below this level to continue unabated and unchallenged.[183] As applied to housing, the severe or pervasive requirement establishes a degree of judicial tolerance for some harassment, in effect qualifying the FHA's promise of "fair housing . . . throughout the United States"[184] to one of housing with a fair degree of harassment.

The effects of application of the new "tangible action" standard to residential sexual harassment remain unknown, but certain suppositions can fairly be made. For example, if the landlord demands that his tenant have sexual intercourse with him, the tenant refuses, then later the landlord evicts the tenant, it is the eviction that renders the harassment actionable, not the

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operates on a time line. . . . Having realized that a rigid distinction between *quid pro quo* and environmental harassment is both analytically incorrect and undermines the purposes of Title VII, one court recently stated: 'Preventing sex discrimination in employment is too important a goal to turn upon the vagaries of what does and what does not constitute a *tangible* job benefit as distinguished from what is evidently considered to be an *intangible* benefit such as psychological well-being at the workplace.'

179. *See supra* note 69.

180. *See Ellerth*, 524 U.S. at 760 (describing what may be a tangible employment action).

181. *See id.* at 762.

182. *See, e.g., Ellerth*, 524 U.S. at 751 (referring to hostile environment sexual harassment as "bothersome attentions or sexual remarks," effectively trivializing its severity).

183. *See* Oshige, *supra* note 56, at 566-67 ("Because courts require plaintiffs to establish the severity or pervasiveness of the objectionable conduct, implicitly they condone a certain level of discriminatory conduct.").

184. 42 USC § 3601 (1999) (stating the FHA's declaration of policy).

threat itself.[185] In effect, the landlord is committing an extortionate threat of eviction couched in implicit terms due to his inherent power over the tenant. He is encouraging the tenant to equate rent money with sexual acts that intimately violate both her physical integrity and her very dignity, coercing her to choose between two evils: submitting to an inherently forcible solicitation of prostitution in order to save her housing, or refusing to do so and thereby endangering the security of her home and herself. Such a "choice" is per se severe; it requires no further scrutiny. Yet this very situation would go unpunished under the tangible housing action theory, unless the tenant suffers some palpable economic detriment, or unless she proves that it was severe or pervasive.[186] What is evident from this illustration is the role of the power dynamic, the intrinsic authority the landlord has over his tenant, such that it is unnecessary for him to state the obvious consequence of the tenant's refusal. Indeed, this implied threat embodied by the offender in his authoritative role was exactly at issue in *Ellerth*.[187] However, the Court found that because Ellerth's supervisor did not fulfill his threats, her claim should have been categorized as a hostile environment one, requiring her to prove the harassment was severe and pervasive.[188]

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185. Cases in which the victim is coerced into compliance with the superior's threat are likewise required to meet the severe or pervasive burden, rather than the automatic liability of the tangible action standard. The rationale is that the actionable tangible consequence is not coerced sex, but rather the fulfillment of the threat to terminate the employment or housing. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' ... The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.").

186. "For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." *Ellerth*, 524 U.S. at 754.

187. Plaintiff Ellerth was subjected to a series of sexist and offensive comments made by Slowik, her supervisor. *See Ellerth*, 524 U.S. at 753. On one occasion, when Ellerth did not respond favorably to his remarks about her breasts, Slowik told her to "loosen up," and threatened "I could make your life very hard or very easy at Burlington." *Id.* at 748. Later Slowik expressed reservation in Ellerth's promotion interview because she was not "loose enough." *Id.* On another occasion Slowik said he did not have time for Ellerth's work-related inquiry "unless you want to tell me what you're wearing." *Id.* Yet again, in response to a question by Ellerth, Slowik asked "[A]re you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.*

188. *See Ellerth*, 524 U.S. at 758 (rejecting the plaintiff's characterization of her claim as quid pro quo because she suffered no tangible employment action). Ultimately, the Supreme Court affirmed the appellate court's reversal of summary judgment against Ellerth, allowing the district court on remand to assess whether

Furthermore, consideration of what constitutes a "tangible housing action" makes the inappropriate transposition of employment standards to housing immediately apparent.[189] The housing equivalent to termination from employment is eviction. The consequences are clearly discordant: unemployment is far less severe than homelessness.[190] Furthermore, the rental housing market is markedly more competitive than the job market, and

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Burlington can successfully prove the available affirmative defense. *See id.* at 765-66.

189. *See Ellerth*, 524 U.S. at 762 (describing what may be a tangible employment action). "A tangible employment action in most cases inflicts direct economic harm .... Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.*

190. While this contention relies on specific yet varying economic forces such as unemployment and vacancy rates, it is unquestionably true of the current economy. HUD's website discusses the interplay of the economy and availability of affordable housing:

> Despite 6 years of unprecedented economic growth, millions of families still struggle to secure decent affordable housing. Ironically, the strong economy is a key factor pushing rent levels to new record highs. Rather than benefiting from the surging economy, low-income renters are left to compete for the dwindling supply of affordable rental housing available on the private market.

Waiting in Vain: An Update on America's Rental Housing Crisis (last modified June 30, 1999) <http://www.huduser.organizations/affhsg/waiting/execsum.html>. Issued by HUD as an update documenting the ongoing shortage of affordable housing, this report identifies three primary findings: (1) time on Section 8 waiting lists for both vouchers and public housing has substantially increased from 1996 to 1998; (2) the number of families on waiting lists is increasing, now at a high of one million families; and (3) the lowest income families and seniors have nowhere else to turn but these HUD subsidies. *See id.* The findings are due to a number of named factors, including the fact that rents are outpacing income for poor Americans; according to the Bureau of Labor Statistics, between 1995 and 1997 rents increased faster than income for the 20 percent of families with the lowest household incomes. *See id.* Between 1996 and 1998, the Consumer Price Index for Residential Rent rose 6.2 percent, while the rate of inflation for the same period was only 3.9 percent. *See id.* There is a dramatic and consistent loss of affordable housing (defined as units with rents below $300), a staggering 13 percent drop between just 1996 and 1998 for a loss of almost 950,000 units. *See id.* Additionally, as project-based subsidies expire and are due for renewal, the private owners of these project-based subsidies are continually opting out of their contracts to convert the units to unsubsidized in order to charge higher rents. *See id.* The decline of project-based subsidized housing consequently increases the number of vouchers issued to residents of properties that opt out. *See id.* However, the replacement of project-based housing with vouchers is a trend that exacerbates the isolation of low-income families in high-poverty neighborhoods, as often the vouchers do not pay enough to allow residents to stay in their current housing. *See id.* They therefore are forced to seek virtually nonexistent affordable housing in the poorest neighborhoods, a search that often results in homelessness. *See id.* In sum, "[a]t a time of unprecedented prosperity for so many, islands of despair remain. The very strength of our economy is forcing the poorest renters to compete for a shrinking pool of affordable units." *Id.*

thus the likelihood of finding a replacement home is far less than finding another job.[191] Other tangible housing actions may include changes in any material term or condition of a victim's tenancy, such as termination of utilities or failure to make necessary repairs. Therefore, in order for a tenant to preclude the availability of the new affirmative defense, she must lose her home, or at least some material condition of its utility. Surely such a consequence is far too severe to be in the interests of justice.

Conclusion

The sexual harassment of female tenants by their landlords is a flagrant abuse of power, the consequence of which may be coerced sex, homelessness, or both. While only a handful of residential sexual harassment cases have been reviewed by the federal courts, responsive legal examination is critically needed given the dire circumstances of the victims and the criminal nature of the underlying conduct. Courts have transposed standards developed in Title VII employment cases onto residential sexual harassment cases without considering the conceptual differences between the two types of harassment, despite a legal tradition granting the home heightened protection.[192] The failure of current sexual harassment laws in the employment context demands that the judicial system consider a more effective remedy; the developing nature of residential sexual harassment jurisprudence provides the malleability to welcome this needed change. Despite the Supreme Court's recent decisions regarding sexual harassment, federal courts are in a state of confusion as to what the current law is and how to implement it. Applying such an inherently flawed paradigm to the particularly and intimately abusive breed of discrimination in one's home will inevitably perpetuate many of the same problems, but with even more grave results suffered by those most vulnerable to them.

It would be an inflammatory injustice to uphold the

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191. *See id.; see also* Adams, *supra* note 2, at 32-33 (explaining that there is substantial disparity between supply and demand for affordable housing, and thus prospective tenants compete intensely for available units).

192. *See* Adams, *supra* note 2, at 20. "In the cases that have considered the issue, courts have simply analogized sexual harassment at home to sexual harassment in employment, applying the doctrinal analysis developed in that setting. While the employment paradigm has some usefulness, its application is limited by the qualitative differences in women's experiences in the two settings." *Id.*

application of ineffective laws and legal standards to circumstances dealing inherently with people most in need of legal protection. The overwhelming majority of victims of residential sexual harassment are women of color struggling to raise their children in situations of desperate poverty. With no money to move, and nowhere to go even if the money were available, these women are literally trapped. When the landlord comes not only to their doors, but also into their homes—he has his own key, after all—demanding sex, spewing sexist comments and slurs, and threatening eviction if the women refuse to submit, it is unconscionable that our laws require that the women then prove that such conduct was "severe," or that its consequence was "tangible." Sexual harassment is discrimination based on sex; sexual harassment in housing is the economic exploitation of the most vulnerable cross-section of the population in their most intimate setting. Thus far our courts have failed to give due credence to this horrendous invasion of women's rights and homes. A clearly-articulated doctrine that necessitates consideration of landlords' overwhelming socioeconomic power over their tenants and the intrinsically intimate setting of the home is desperately needed.